No. 610. 260.

610

FILED.
APR 21 1898
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

JAMES A. BRIGGS, EXECUTOR OF THE WILL OF CHARLES M. BRIGGS, DECEASED.	*Plaintiff in Error.*
VS.	610
AMANDA M. WALKER, AND THE OHIO VALLEY BANKING & TRUST COMPANY ADMINISTRATOR OF THE ESTATE OF A. L. SHOTWELL, DECEASED.	*Defendants in Error.*

NOTICE.

Plaintiff in error will take notice that on Monday, April 25th, 1898, the defendants in error in the above entitled cause will move the Supreme Court of the United States to dismiss with damages the writ of error herein, for want of jurisdiction in that court over this cause; and with said motion will couple a motion to affirm the judgment of the Court of Appeals of Kentucky herein, in case the motion to dismiss shall be overruled.

HELM BRUCE,
Counsel for Amanda M. Walker.
SAM'L B. VANCE,
Counsel for Ohio Valley Banking & Trust Co., Administrator of A. L. Shotwell.

Receipt of a copy of the above notice, with a copy of the brief of counsel for defendants in error in support of the motions therein referred to, is hereby acknowledged.

CHAS. H. GIBSON,
Counsel for Plaintiff in Error.

April 4, 1898.

No. Orig. 260.

FILED.
APR 21 1898
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

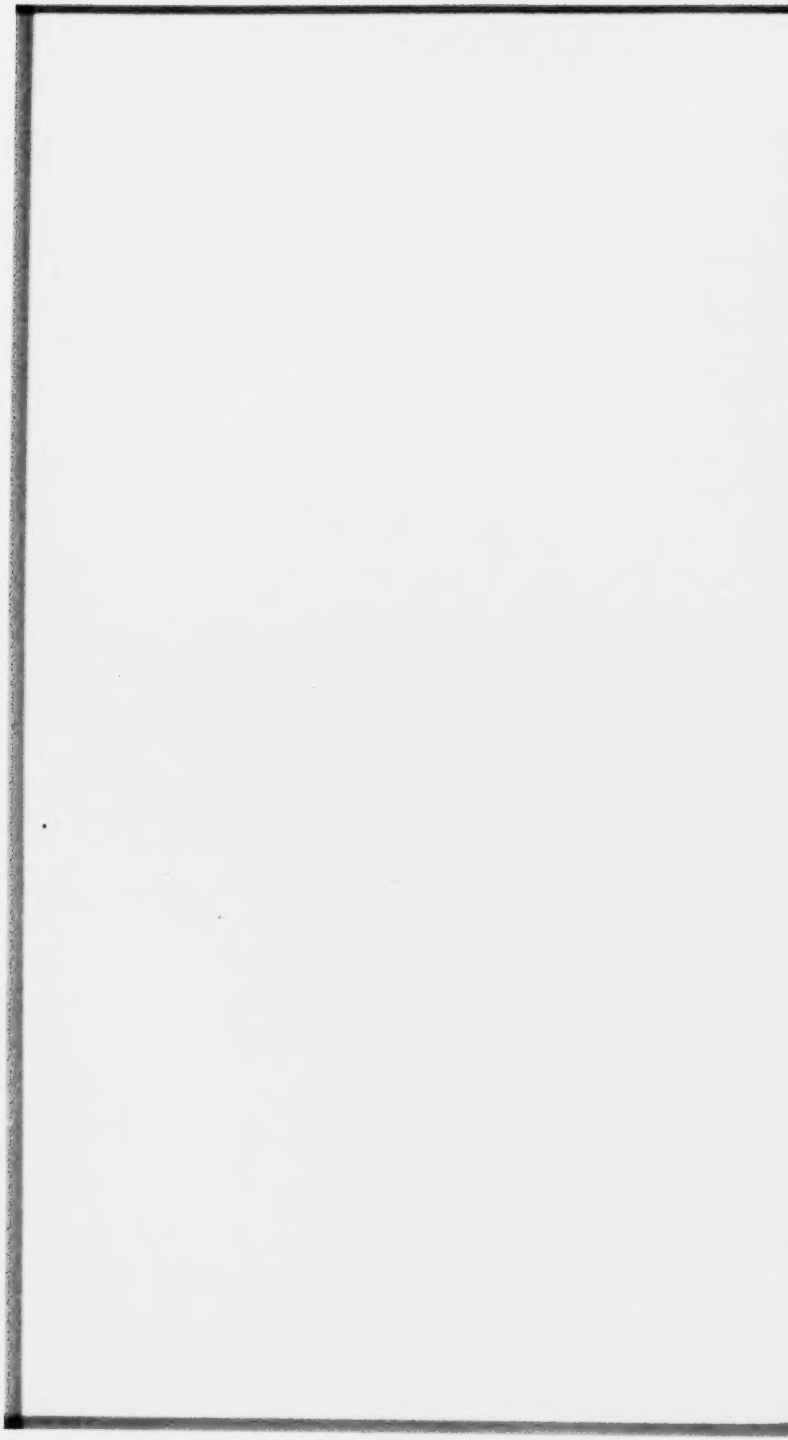
JAMES A. BRIGGS, EXECUTOR OF THE WILL OF CHARLES M. BRIGGS, DECEASED.	*Plaintiff in Error.*
VS.	610
AMANDA M. WALKER, AND THE OHIO VALLEY BANKING & TRUST COMPANY ADMINISTRATOR OF THE ESTATE OF A. L. SHOTWELL, DECEASED.	*Defendants in Error.*

MOTIONS.

1. Defendants in error move the Court to dismiss with damages the writ of error to the Court of Appeals of Kentucky herein; and for ground of such motion say there is no Federal question involved in this cause, and this Court has no jurisdiction over such cause.

2. But if this Court shall consider that it has jurisdiction over this cause, then said defendants in error move the Court to affirm the judgment of the Court of Appeals of Kentucky herein with damages, in addition to interest; and for ground of such motion say the writ of error herein was taken for delay only, and the question on which the jurisdiction of the Court depends, if there be such jurisdiction, is so frivolous as not to need further argument.

HELM BRUCE,
Counsel for Amanda M. Walker.
SAM'L B. VANCE,
Counsel for Ohio Valley Banking & Trust Company, Administrator of A. L. Shotwell.



FILED.
APR 23 1898
JAMES ... McKENNEY,
CLE

No. 610. 260.

Brief of Abert, Gibson, Marshall &
Sanders for P. E. C

Supreme Court of the United States.

OCTOBER TERM, 1893.

Filed April 23, 1898.

No. 610.

JAMES A. BRIGGS, EXECUTOR OF CHARLES M. BRIGGS, DECEASED, PLAINTIFF IN ERROR.

vs.

AMANDA M. WALKER AND OHIO VALLEY BANKING AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF A. L. SHOTWELL, DECEASED.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

WM. STONE ABERT.
CHARLES H. GIBSON,
JOHN MARSHALL,
D. W. SANDERS,
Counsel for Plaintiff in Error.

LAW REPORTER PRINT.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 610.

JAMES A. BRIGGS, EXECUTOR OF CHARLES M. BRIGGS, DECEASED, PLAINTIFF IN ERROR.

vs.

AMANDA M. WALKER AND OHIO VALLEY BANKING AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF A. L. SHOTWELL, DECEASED.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

THE JURISDICTION.

The plaintiff in error, James A. Briggs, executor, claims the right to have this cause reviewed by this court by virtue of the provisions of Section 709, of the Revised Statutes of the United States. He insists that in his amended answers to the several answers and cross-petitions of Shotwell and Walker (Rec., pp. 25, 30), he specially set up and claimed right and title to the fund awarded and collected under the decision of the Court of Claims (Briggs *vs.* United States, 143 U. S. Rep. 346), by virtue of the Act of Congress approved June 4, 1888, chapter 348, 25 Statutes at L., p. 1075.

He procured the passage of this statute, which was for the exclusive benefit of the "*legal representatives*" of C. M.

Briggs, deceased, and upon which he relied to defeat the claims of the defendants in error, in this case.

The demurrer of the defendants in error to the said pleadings of Briggs, executor, was sustained by the Jefferson Circuit Court, Chancery Division, June 10, 1895; to which ruling Briggs, executor, excepted (Rec., p. 53).

In affirming the decision of the lower court, the Court of Appeals of Kentucky decided against the title and right specially set up and claimed by Briggs, executor, and denied the right and title thus claimed (Rec., p. 80).

The claim of Briggs, executor, as appears in the Record, fully complies with the requirements of Section 709, R. S., as construed by this court in—

Oxley Stave Company *vs.* Butler County, 166 U. S. Rep. 653.

Burthe *vs.* Denis, 133 U. S. Rep. 520.

Blagge *vs.* Balch, 162 U. S. Rep. 439.

Louisville and Nashville Rwy. Co. *vs.* Louisville, 166 U. S. Rep. 715.

Kaukauna County *vs.* Greenway Canal, 142 U. S. Rep. 269.

The plaintiff in error contends that upon a proper construction of the Act of Congress of June 4, 1888, chapter 348, the "legal representatives" of C. M. Briggs are alone entitled to the benefits arising under the act; and that the executor is entitled to distribute the net proceeds of the fund of $88,000 (received from the United States) among the "*legal representatives,*" to the exclusion of the creditor claims presented in this case in behalf of the defendants in error.

The act is as follows:

"An act for the relief of the estate of C. M. Briggs, deceased."

"Be it enacted, etc., That the Court of Claims is hereby given, subject to the proviso hereinafter mentioned, like jurisdiction to hear and determine the

claim of the *legal representatives* of C. M. Briggs, deceased, for the proceeds of four hundred and fifty-five bales of cotton, now in the Treasury of the United States, alleged to have been owned, in whole or part, by said Briggs, as is given to said court by the acts of March twelfth, eighteen hundred and sixty-three, and July second, eighteen hundred and sixty-four, upon petition to be filed in said court at any time within two years from the passage of this act, any statute of limitations to the contrary notwithstanding;

"*Provided, however*, That unless the said court shall, on a preliminary inquiry, find that said Briggs was in fact loyal to the United States Government, and that the assignment to him hereinafter mentioned was *bona fide*, the court shall not have jurisdiction of the case, and the same shall, without further proceedings, be dismissed;

"*And provided further*, That if the court shall find that the alleged assignment from one Morehead to said Briggs, of date April eighteenth, eighteen hundred and sixty-two, under which said Briggs claimed said cotton, was intended only as security to said Briggs for indebtedness, and against contingent liabilities, assumed by him for said Morehead, judgment shall be rendered for such portion of the proceeds of said cotton as will satisfy the debts and claims of said Briggs, to secure which said assignment was given;

"*Provided*, Said judgment shall not be paid out of the general fund in the Treasury arising from the sale of captured and abandoned property, but shall be paid out of the special fund charged to and accounted for by Captain G. L. Fort, assistant quartermaster at Memphis, arising from the sale of the two thousand two hundred and nine bales of cotton received by him, with which claimant's cotton was intermingled, said claimant to receive only the proportion which his cotton bears to the net proceeds accounted for by said Fort. (June 4, 1888, Ch. 348, 25 Stat. L. 1075.)" (Rec., p. 25).

In pursuance of the authority granted by this act, the executor instituted an action in the court of claims to recover the proceeds of the cotton or so much thereof as would pay him the amount named in the act, viz.: So much as would satisfy the debts and claims of said C. M. Briggs, to secure which the following contract of sale had been executed by Charles S. Morehead and delivered to Charles M. Briggs, to wit:

> "For and in consideration of money loaned and advanced heretofore by C. M. Briggs, and further valuable consideration by way of suretyship for me by said Briggs, I hereby sell and transfer to C. M. Briggs all of the cotton on my two plantations in Mississippi, near Eggs Point and Greenville. Said cotton, so sold, embraces all that I have, baled and unbaled, gathered and ungathered. This is intended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about 2,000 bales.
>
> "April 18, 1862. C. S. MOREHEAD."
>
> (Rec., p. 29.)

The claims of the defendants in error are based upon the following contract, to wit:

> "In consideration of the sale and transfer this day made to me by C. S. Morehead of all the cotton on his two plantations near Eggs Point in the State of Mississippi, as specified in said sale and transfer, in writing, I hereby assume and agree to pay to Samuel J. Walker the sum of forty thousand dollars, due and owing to said Walker by said C. S. Morehead, *upon condition*, however, that I realize sufficient amount from any cotton on or from said plantations or proceeds of same, *together* with about twenty-five thousand dollars due me from said C. S. Morehead for moneys advanced and liability for him as surety; *also* about ten thousand dollars, more or less, being a claim of A. S. Shotwell as he may hereafter establish against said C. S. Morehead; but in case I should not realize sufficient to pay all of said claims

or amounts above named in full, then I am to pay or divide the amount that may be realized from said cotton proportionately, or *pro rata*, according to the respective amounts named to the parties above named; first, however, paying and refunding any moneys paid by the respective parties for or on account of expenses pertaining to same, and in case more should be realized than sufficient to pay said amounts, with interest thereon to the time of realization and payment, then any surplus to be divided, one-half to said Shotwell and (C. M. Briggs) jointly for any services, and the remaining one half to said Samuel J. Walker, but no other consideration to be paid to said Shotwell and Briggs for their service.

"April 18, 1862. C. M. BRIGGS."

(Rec., p. 18.)

The application for relief, which resulted in the act of grace on the part of Congress, was based upon the *absolute ownership* by C. M. Briggs of the four hundred and fifty-five bales of cotton, which had been seized by the Federal troops and sold and the proceeds paid into the Treasury of the United States.

The act of Congress was in the nature of a contract between the United States and the "legal representatives" of Briggs, to pay them for cotton seized by the Government, and which belonged absolutely to Briggs, and in which act Walker and Shotwell were, by necessary implication, excluded from any benefit.

The position of Briggs, executor, with relation to the act of Congress was the same as if he had notified Walker and Shotwell, with their approval, that he would not collect anything for them, but only for the "legal representatives" of Charles M. Briggs, deceased.

Herbert *vs.* Butler, 97 U. S. Rep. 322.

And by the position which was occupied by both Walker and Shotwell, they proved that the ownership of the cotton

by Briggs was absolute and *bona fide* (Rec., pp. 27, 34, 39, 51), thereby excluding themselves from all right to share in the bounty and act of grace of Congress.

> "The phrase 'legal representatives' or personal representatives has frequently been held to mean next of kin, just as the word heirs sometimes means children or more distant relatives.
>
> Wigram and O'Hara on Wills, (1872), p. 306.
>
> Emerson's Heirs *vs.* Hall, 13 Peters' Rep. 412.
>
> Relief Association *vs.* McAuley, 2 Mackey's D. C. Rep. 70.

This term has *never* been construed to mean creditors.

The act of Congress was for the benefit of "legal representatives" of C. M. Briggs, who were required to prove his loyalty and title. The act was not for the benefit of the alleged then existing creditors of said Briggs, whose loyalty was not proved—whose loyalty possibly could not have been proved and whose claims were unknown to the United States as well as to the executor, and he (the executor) never agreed to act as trustee for unknown beneficiaries.

Walker and Shotwell and all other persons (save "legal representatives") were by necessary implication, excluded by the act of Congress, from all beneficial interest in the proceeds of sale of the four hundred and fifty-five bales of cotton. The legal maxim applies: "*Expressio unius est exclusio alterius,*" and should aid in the construction of the act of Congress.

The legislative intention of Congress could not have been more clearly expressed if the act had contained the words next of kin, heirs at law, or devisees, instead of the term "legal representatives."

The fund to be collected through the judgment of the Court of Claims was by the language of the act as completely protected from the claims of creditors or assignees of C. M. Briggs as if the act had in terms declared that the executor

of Briggs should collect the claim for the cotton, and distribute it exclusively among the next of kin or devisees of said C. M. Briggs.

The construction of the term "legal representatives" depends upon the intention manifested by the party using it, and it has not therefore always the same signification. Such intention is not only to be gathered from the instrument or statute itself, but also from the surrounding circumstances then existing and the situation of the parties affected by it. And whether the inquiry is in relation to wills or statutes the same rule of construction obtains.

If Congress had intended that the fund to be awarded should be assets in the hands of the executor of Briggs for the payment of the claims of his alleged creditors, the act would have so declared. And in order that such meaning could be applied to the act, "*the jurisdiction to hear and determine the claim of the 'legal representatives' of C. M. Briggs, deceased,*" must of necessity have been omitted. It is inconsistent with rights of creditors therein.

The act of Congress expressly excluded from the jurisdiction of the Court of Claims, any right of recovery for any "*contingent liabilities assumed by him* (C. M. Briggs) for said Morehead" (see last line of p. 25, Rec.).

The claims of Walker and Shotwell may properly be classed as the contingent liabilities of Briggs, and which were expressly excluded from the provisions of the act of Congress.

There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees and is not subject to distribution in any other mode, such as specific property bequeathed to individuals.

In numerous cases the term "legal representative" has been construed as synonymous with next of kin; or, rather, as descriptive of the persons taking the estate under the

statute of distribution, who in a popular sense may be said to represent the deceased.

Upon an examination of the authorities at common law, it will be found that the construction of the term depends upon the intention manifested by the party using it. And when the term is used in wills, it is said that the words personal representative or legal representative are usually applied to executors or administrators of the person described. This legal construction only takes place when testators have not manifested in their wills any intention to the contrary; for if it appears from the dispositions in the instrument, whether by deed or will, that those words are used in reference to other persons than executors or administrators, that intention will prevail. And the meaning of terms may be gathered from surrounding circumstances and also from the writing itself.

The true construction of the term "legal representatives," as applied to the act of Congress in question means such persons as could claim the fund beneficially, which would be the next of kin or devisees of C. M. Briggs, deceased.

Emerson's Heirs *vs.* Hall, 13 Peters Rep. 409.
Bridge *vs.* Abbott, 3 Brown Chy. Rep. 226.
Jennings *vs.* Gallimore, 3 Vesey Rep. 146.
Long *vs.* Blackall, 3 Vesey Rep. 486.
Cotton *vs.* Cotton, 2 Beavan Rep. 67.
Phyfe *vs.* Phyfe, 3 Bradf. Sur. Rep. 45.
Ware *vs.* Fisher, 2 Yeates Rep. 578.
Thompson *vs.* Young, 25 Md. Rep. 450, 461.
2 Jarmin on Wills (*39), 4th Am. Edition.
Blagge *vs.* Balch, 162 U. S. Rep. 465.
Relief Association *vs.* McAuley, 2 Mackey's Rep. 70.

THE MOTION TO AFFIRM.

They who come into a court of equity seeking equity must come with clean hands and a pure conscience.

If the executor in claiming, as he did, to Congress and

the Court of Claims, that the claim of the "legal representatives" of C. M. Briggs, deceased, was for the proceeds of cotton which belonged *absolutely and bona fide* to said C. M. Briggs, which claim was supported by the sworn statements of Walker and Shotwell; then their conduct was such that a fraud was thereby perpetrated upon the Government of the United States, and they cannot now take advantage of and profit by their own wrong.

They must themselves be free from false representations before they can ask the protection of a court of equity to aid them in the enjoyment of the profits of their own false representation.

It is strenuously insisted that a court of equity would violate its principles and abuse its powers, by consenting to aid them in accomplishing their purpose.

Such a scheme is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character.

The court will never assist wrong-doers in effectuating their wrongful purpose.

The judgment of the Court of Claims was conclusive alike upon Briggs' executor for the payment of the claim of the "legal representatives" of C. M. Briggs, deceased, and also conclusive upon Walker and Shotwell, who were, by their conduct in the case, in privity with the executor. And the judgment thus obtained through the evidence of Walker and Shotwell operated as an estoppel against their claims.

On page 7 of the brief of the defendants in error, their counsel cite, as an exactly similar case Hobbs *vs.* McLain, 117 U. S. Reports, 580; but that case is clearly distinguishable from this one, in that in this case the witnesses testified that the ownership of the cotton by Briggs was *absolute*, and thereby they asserted that they had no interest in the claim pending in the Court of Claims.

In that case the maxim "*In pari delicto melior est conditio possidentis et defendentis,*" might well have been applied. This is a maxim of public policy equally respected in courts of law and courts of equity.

1 Story's Equity Juris., Sec. 61.

It was not, however, called to the attention of the court. Neither was the proposition requiring a party seeking equity to come into court with clean hands.

In that case the plaintiff appears to have relied solely upon the doctrine of equitable estoppel. The other two propositions which might have controlled the case, were not presented by counsel nor considered by the court.

And the Record in this case, fails to show, that the executor or "legal representatives" of C. M. Briggs, deceased, had at the time of the passage of the act of Congress, or during the pendency of the case in the Court of Claims, any knowledge of the contract, under which the claims of Walker and Shotwell were established.

The propositions already discussed, seem to be decisive of the case at bar. But the court will pardon us for calling its attention to the following legal propositions:

First.

Contracts are strictly construed, and parties are bound by the *terms* and *conditions*, which they *voluntarily* impose upon themselves.

Second.

Every *condition precedent* specified in a contract, must be *pleaded* and *proven* before the party can recover upon the contract relied upon.

Third.

Where the condition precedent does not occur, by reason of the conduct or act of a third party, over whose action or

conduct the contracting parties have no control, then the contract can not be enforced.

By the terms of the written agreement under which the defendants in error claimed the right to recover, the obligation of C. M. Briggs to pay was ONLY UPON CONDITION that *said Briggs* realized from any cotton on or from said plantations.

The happening of said event was, by the very terms of the contract, a condition precedent to payment.

Briggs, in his lifetime, made every effort in good faith to get possession of the cotton; but by reason of the action of the Federal authorities, the cotton was seized and sold, and the money arising therefrom paid into the Treasury of the United States The performance of said condition precedent, was prevented by the action of other persons over whose conduct Briggs could exercise no control.

This action of the Federal authorites, alone, prevented the performance of the condition precedent.

The following authorities are relied upon as establishing the correctness of the foregoing propositions:

Stephany *vs.* Castan, 168 Ill. Rep. 59.
Cincinnati Ry. *vs.* Bensley, 51 Fed. Rep. 740.
Martinsburg Ry *vs.* March, 114 U. S. Rep. 552.
United States *vs.* Robeson, 9 Peters Rep. 327.
Dermott *vs.* Jones, 23 How. Rep. 231.

RESPONSE TO ADDENDUM BRIEF OF DEFENDANTS IN ERROR.

It appears in the Record (pp. 1 and 2) that the original suit was filed for the purpose of obtaining a final and complete settlement of the accounts of James A. Briggs, executor.

The original parties were said James A. Briggs, Josephine Briggs, Charles M. Briggs, Herbert Grasty, Emily Grasty, defendants; and Henry A. McLemore, guardian of John Briggs McLemore and Lizzie R. McLemore. John Briggs McLemore, Lizzie R. McLemore, by their next friend, H. A. McLemore, were plaintiffs.

That suit could not have been maintained, nor could the court even have had jurisdiction to make any order therein, not even to render the judgments relied upon by the defendants in error, except upon the necessary determination that the said parties were the legal representatives and devisees under the will of Charles M. Briggs, deceased.

The fund in controversy was received by said James A. Briggs, executor, by virtue of the decision of this court, reported in 143 U. S. Reports; and on page 349 of the Report we find this statement:

> "C. M. Briggs having died, *his brother*, James A. Briggs, was on the 15th of July, 1875, appointed executor of his estate by the county court of Jefferson County, in Kentucky. . . . He accepted the trust, and qualified by taking the necessary oath and executing the required bond."

The fact of the relationship of this executor to his deceased brother was as conclusively established by this court, as the right of said James A. Briggs to receive the fund.

We respectfully and confidently submit that both motions filed in this case should be overruled.

WM. STONE ABERT.
CHARLES H. GIBSON,
JOHN MARSHALL,
D. W. SANDERS,
Counsel for Plaintiff in Error.